

ERIC MAROWA

Versus

MABAYA & SONS TRANSPORT & GENERAL CONTRACTORS CC

And

ELVIS MABAYA (2)

HIGH COURT OF ZIMBABWE

ZISENGWE J

MASVINGO, 6 September & 15 February 2023

Civil Trial

Mr M. Mureri, for the plaintiff
S.C Ncube, for the 1st defendant

ZISENGWE J: The present dispute is an off-shoot of the main matter between the parties and comes as a result of the judgement I delivered in *Eric Murowa v Mabaya & Sons Transport & General Contractors CC & Another* HMA 61-22. The following background facts suffice by way of recap. The plaintiff instituted a claim for the recovery of the sum of ZAR 1 830 272 in *delictual* damages arising from injuries he sustained in a motor vehicle collision.

The accident occurred on 20 November 2020 at the 220km peg along the Masvingo-Beitbridge highway and the plaintiff attributes liability for the accident to the two defendants. The plaintiff alleges that he was severely injured in the collision wherein a Nissan UD truck driven by the 2nd defendant collided with the heavy truck which he (i.e., plaintiff) was driving. He avers in his declaration that the 2nd defendant encroached into his lane leading to the collision. He sustained several bodily injuries chiefly on his left leg and foot. He imputes vicarious liability on the 1st defendant on the basis that 2nd defendant was driving the UD truck during the course and scope of his employment with the 1st defendant at the time of the accident.

In response to the claim the 1st defendant raises a special plea and two exceptions. In respect of the former, it is 1st defendant's position that plaintiff's failure to observe what he terms the peremptory provisions of the National Social Security Authority (Accident Prevention and Workers Compensation Scheme) (prescribed matters) Notice, 1990 (SI 68 of 1990), hereinafter referred to as the "NSSA scheme" renders the claim defective. According to the 1st defendant, section 10 (2) as read with subsection 1 of the same section, the NSSA scheme precludes any worker who has been injured at work from instituting legal proceedings against third parties for the recovery of damages without first lodging a claim for compensation to NSSA's general manager. Section 10 of the NSSA scheme provides as follows:

10 (1) where an accident in respect of which compensation is payable was caused in circumstance creating a legal liability in some person other than the employer (hereinafter referred to as "the 3rd party" to pay damages to the worker in respect thereof-

(a) The worker may both claim compensation under this scheme and take proceedings against the 3rd party in a court of law to recover damages:

Provided that where any such proceedings are instated the court shall, in awarding damages, have regard to the amount which, by virtue of paragraph (b), is likely to become payable to the general manager or the employer individually liable, as the case may be, by the third party, and

(b)

(2) A worker shall, before instituting proceedings under subsection (1), in writing notify the general manager or the employer individually liable, as the case may be, of his intention to do so and shall likewise notify the general manager or the employer if he decided to abandon such proceedings or to relinquish or settle his claim for damages, and shall on connection with any such notification furnish such particulars on the general manager may require.

No proceedings in a court of law to recover damages against any person referred in subsection (1) may be taken by a worker until he has so notified the general manager of his intention to take such proceedings and unless he has lodged a claim for compensation.

The first exception on the other hand relates to the compulsory third party insurance cover under sections 22 and 25 of the Road Traffic Act, [Chapter 13:11]. In this respect, the 1st defendant's contention is that the said provisions to some extent indemnify an insured person in terms of the compulsory third party insurance scheme and provide that a person in plaintiff's position can sue an insured person only in respect of any amount in excess of the insurance

cover, a requirement which the plaintiff failed to observe. Accordingly, the 1st defendant avers that there was no valid cause of action which had been raised by the plaintiff and his claim was therefore excipiable.

The second exception relates to plaintiff's position in denominating his claim in foreign currency allegedly contrary to the provisions of section 23 (1) and (3) of the Finance Act (No.2) of 2019 which was applicable at the time of the institution of the suit. According to the 1st defendant, plaintiff's claims is incompetent for want of compliance with the said provision which at the time decreed the exclusive use of the Zimbabwean currency as the sole legal tender for domestic transactions.

The plaintiff opposes both the special plea and each of the two exceptions. As far as the special plea is concerned, it is the plaintiff's position that he does not fall under the NSSA scheme for the reason that at the material time, though domiciled in Zimbabwe, he was employed by a South African company called Grindroad Investments and that he was ordinarily based in South Africa and therefore exempt from the NSSA scheme. Implicit in his position therefore is the contention that he was not required to notify NSSA, general manager first before instituting the claim against the two defendants. He refers to his "Zimbabwe special exemption permit" granted by the South African government ostensibly demonstrating that he was employed in South Africa.

In the alternative he avers that should the court find that the NSSA scheme is broadly applicable to him, he nonetheless falls into that category of persons exempt from its reach by virtue of him having been resident outside Zimbabwe for a period in excess of 12 months as contemplated in the proviso to section 13 (1) of the NSSA scheme. The said provision reads:

"13 (1) Where an employer carried on business chiefly within Zimbabwe and the usual place of employment of his worker is in Zimbabwe and an accident happens to his worker while the worker is temporarily employed by him out of Zimbabwe, the worker shall be entitled to compensation in the same manner as if the accident had happened in Zimbabwe:

Provided that this subsection shall cease to apply to a worker after he has been employed out of Zimbabwe for a continuous period of 12 months, unless the general manager has, before the end of this period, agreed with the worker and the employer concerned that those provisions should, subject to

such conditions as the general manager may determine, continue to apply.
(Emphasis added)

As for the first exception, i.e., the one based on section 25 of the Road Traffic Act, the plaintiff's position is that same does not preclude him from proceeding against the 1st defendant as he could not assume that the 1st defendant was covered under a 3rd party insurance scheme. He therefore contends that the onus rests squarely on the insured party, in this case 1st defendant, to avail documentary proof of it having been so insured.

Regarding the exception based on the alleged impropriety of denominating his claim in South African Rand, the plaintiff avers firstly that SI 185/20 reintroduced the multi-currency regime in Zimbabwe and altered the previous position under section 23 of the Finance Act (No. 2) of 2019 which hitherto imposed a strict single currency regime in the country.

Secondly, the plaintiff avers that he incurred the bulk of his financial loss in South African Rand having had to receive medical care and having paid for the same in South Africa in that currency.

After hearing submissions from the parties in relation to the special plea and two exceptions, I realised in line with the *ratio* in *Jennifer Nan Brookes v Richard Mundanda & Others* SC 5-18 that I could not properly dispose of the special plea without hearing further evidence. I found the following passage from that case instructive.

“The failure by the court a quo to call evidence was akin to a court which determines a matter through the application procedure in the face of material disputes of fact. The learned Judge in the court a quo failed to appreciate that prescription is a defence and therefore a matter of substance. The court a quo and the parties before it, ignored the nature of the pleading that was central to the dispute. Essentially what had to be disposed of was a plea its nature did not change by virtue of having the adjective “special” placed before it. It remained a plea which is a defence and which the court could only determine after hearing evidence unless the facts surrounding the plea were common cause as admitted. The facts were in dispute. It was therefore a matter for a trial cause. It is referred to as a special plea mainly due to its ability to destroy the action or postpone the proceedings.”

It was on that basis that I expressed the view that in light of the plaintiff's defence to the special plea, the dispute pertaining thereto was incapable of resolution in the absence of further evidence. Such evidence was necessary to determine whether or not the NSSA scheme applied to him.

Accordingly, I gave the following order

It is ordered as follows;

1. *The special plea raised by 1st defendant over the applicability of Statutory Instrument 68 of 1990 to the plaintiff is hereby referred for oral evidence.*
2. *The 1st defendant in consultation with the Registrar to set down the matter referred to in 1 above within 21 days of this order subject to any directions the parties may seek from the court in this regard.*
3. *The two exceptions raised by the 1st defendant are hereby held in pending the outcome in 1 above.*
4. *Costs are in the cause.*

Pursuant to the above order, oral evidence was led from the plaintiff only. The 1st defendant elected not to call any witnesses.

The sum total of the plaintiff's evidence was that at the time of the accident he was employed on a permanent basis in South Africa by a South African based company called Grindroad Investments, a company which also operated under the Trade Name MB Transport. He produced a copy of a written contract of employment which he entered into with Grindroad Investments dated 1 August 2018. The said contract shows that he was to be employed as a truck driver for a period of 8 years with the possibility of its renewal. Pertinently the said contract supposedly shows that Grindroad was represented by one Brian Musekiwa Mungofa.

According to the plaintiff the Acronym BMT emblazoned on the truck which he was driving on the day of the accident stood for Brian Mungofa Transport, Brian Mungofa being the Director of his employer in South Africa as earlier stated. This, according to him, explains why he avers in his declaration that he was employed by MB Transport.

Other than his employment contract and the South African company registration for Grindroad Investments he also produced copies of his Zimbabwe passport, a South African Revenue Service (SARS) tax certificate in his name date stamped 15 May 2013, and his February 2014 payslip ostensibly showing his employment with a company called SA Metal Group (Pvt) Ltd then.

In addition, the plaintiff produced his South African Zimbabwe exemption permit with registration number ZEP 16733HH as well as a South African Drivers licence. According to him these documents admit of little doubt not only of his employment status in South Africa but also of his residence status therein.

He would be quizzed at considerable length during cross examination on whether there was any documentary proof showing the nexus, if any, between Grindroad Investments and MB Transport. His response was essentially that although he does not have any proof to that effect, however, to his knowledge Grindroad Investments used the trade name MB Transport in Zimbabwe. He indicated that he was not aware of any difference between the two entities and assumed that they were one and the same thing. He would concede that the truck he was driving when the accident occurred was registered in Zimbabwe and bore Zimbabwean number plates and was otherwise subject to the laws and taxes of the country.

He was however unable to avail any payslip with Grindroad when challenged to do so under cross examination. His explanation was that since he was on the road most of the time, he had no opportunity to collect them from the office.

He was also questioned during cross examination on his residence at the material time insisting as he did that, he was predominantly resident in South Africa but would only occasionally come to Zimbabwe to visit his family. He testified in his regard that in South Africa he resided at a place called H10 Camelot Village Primestone, Gemistone in South Africa which incidentally was also his employer's address. He explained that his residence and the company offices happened on the same block.

The first issue that falls for determination is whether plaintiff placed proof showing on a preponderance of probabilities that he was employed in South Africa by Grindroad Investments (Pvt) Ltd and that the said company traded in Zimbabwe as MB Transport.

The evidence before me woefully falls short of such proof. The paucity of documentary evidence showing the relationships between Grindroad Investments (Pvt) Ltd and MB Transport was plaintiff's undoing in this regard. Should such a legal relationship have obtained or still obtains, one would have expected an abundance of documents demonstrative of the same. The fact that both Grindroad and MB Transport might have common directorship or shareholding is not *ipso facto* illustrative of such a legal relationship.

Perhaps plaintiffs need to be reminded of the basic principle of separate legal personality set out in *Salomon v A Salomon & Co Ltd [1896] UKHL 1 [1897] AC* which states that a company is essentially regarded as a legal person separate from its directors its shareholders employees and agents. The plaintiff was as the very least expected to avail confirmatory

documentation demonstrating the legal *nexus* between Grindroad Investments (Pvt) Ltd and MB Transport.

His quest to convince the court of the existence of such a relationship is based on mere conjecture and supposition. One wonders why he could not get a confirmatory letter of that relationship from either of the two entities. The plaintiff was also unsure and unclear whether MB Transport is a mere “branch” of Grindroad Investments as he testified several times in his evidence or it is a subsidiary thereof within the meaning and context of section 185 of the Companies and other business entities Act, [Chapter 24:21], he left everything to chance. Section 185 sets out the requisites for one company to qualify as a subsidiary of another. I can only refer to subsection 1 thereof which provides as follows:

185 Meaning of holding company, subsidiary and wholly owned subsidiary

(1) A company shall, subject to subsection (3), be deemed to be a subsidiary of another if -

(a) that other either—

(i) is a member of it and controls the composition of its board of directors; or

(ii) holds more than half in nominal value of its equity share capital; or

(b) the first-mentioned company is a subsidiary of any company which is that other’s subsidiary:

Provided that the first-mentioned company shall be deemed to be a subsidiary of that other if subsidiaries of that other between them hold more than fifty per centum in nominal value of the equity share capital of the first-mentioned company or if that other and one or more of its subsidiaries between them hold more than fifty per centum of such capital.

The plaintiff therefore needed to show documentation establishing either of the above if his position is that MB Transport is a subsidiary of Grindroad Investments.

The Zimbabwe special Exemption permit granted by the South African Government equally cannot come to his aid when one considers that he was driving a Zimbabwean registered motor vehicle. Viewed in reverse, being the holder of the exemption permit would not have precluded him from being employed by Zimbabwean company, it only permitted him to work in

South Africa. It therefore could not constitute adequate proof of his employment status with a South African company.

To compound matters, plaintiff was unable to provide any payslips ostensibly arising from his employment with Grindroad Investments. He suggested that he has not been able to find time to collect these from his place of residence in South Africa. Given their importance to the current dispute one would have expected him to make an effort to retrieve and avail them for the proceedings.

The plaintiff is the author of his own predicament. He could not in one breath assert (in his declaration) that he was employed by MB Transport and in the next breath claim to have been employed by Grindroad Investments (Pvt) Ltd. He has himself to blame for failing to do his homework to establish who his employer really is to determine whether or not he is covered by the NSSA scheme before rushing to institute a claim against the defendant.

As if that is not bad enough for him, in collateral proceedings in this jurisdiction related to the same accident, two key developments unfolded which negate the notion of plaintiff having been employed by Grindroad Investments at the material time. Firstly, in that application, under cover *HC 330/21* before the High Court in Bulawayo, the applicant held itself out to be MB Transport Private Limited and secondly, the plaintiff in the present matter deposed it and supporting affidavit wherein he averred that he was employed by MB Transport as a driver.

The first observation therefore is that Grindroad Investments and MB Transport are two distinct entities as they have different legal personalities otherwise the latter would have approached the court as the former had it been subsumed by the same. Secondly and equally compelling is the fact the plaintiff stated in supporting affidavit in *HC 330/21* as having been employed by MB Transport. He cannot breathe hot and cold over the same subject matter. He was either employed by Grindroad Investments and MB Transport.

Ultimately, I find that the plaintiff woefully failed to place before the court sufficient evidence proving on a balance of probabilities, that MB transport is a subsidiary of Grindroad Investments and the first leg of plaintiff's defence against the special plea predicated upon his supposed employment by a South African company does not avail him.

Whether or not plaintiff is exempt from the NSSA scheme by virtue of section 13 thereof

The second leg of plaintiff's defence to the special plea is whether he was resident outside the jurisdiction, in this case in South Africa, for a period of 12 months or more immediately preceding the accident.

As with the question of his employment status as discussed above, the plaintiff took too much for granted. He sought to convince the court that he was resident in South Africa for a period in excess of 12 months chiefly upon his mere *ipse-dixit* coupled with perhaps with his special exemption permit. It boggles the mind why for instance he did not go a step further to avail documentary proof suggestive of the *factum* of his residence in that country. Without necessarily prescribing the nature of proof in such instances, the following *inter alia* could have assisted his cause; a lease agreement or agreements indicative of his continuous residence in South Africa or utility bills in his name.

He could also have secured corroborative evidence of his residence at a particular premise or premises in South Africa. By his own admission the plaintiff was on the road most of the time sight must not be lost of the of the fact that the provisions of section 10 of the Scheme, the plaintiff needed to establish continuous residence outside Zimbabwe for a period of 12 months or more.

More pertinently however, a proper construction of the *proviso* to section 13 (1) of the scheme reveals that for this exception to apply, the following pre requisites must be shown:

- (a) That the employer carried on business chiefly in Zimbabwe
- (b) That the worker was temporarily employed outside Zimbabwe
- (c) That the employee was employed outside Zimbabwe for a continuous period of 12 months or more.

There is virtually nothing to indicate that he was employed by MB Transport *in South Africa*. For example, there is no evidence that the plaintiff paid tax to the South African government *as an employee of MB Transport*. Payment of tax to SARS in some other capacity than as an employee of MB Transport would not suffice for purposes of the *proviso* to Section 13 (1) of the scheme. He could have provided, for example, written communication by MB Transport deploying to South Africa or placing him on some secondment in that country. None of that is available.

In the final analysis, the plaintiff having firstly failed to show that he was employed by a foreign entity (Grindroad Investments) to which the NSSA scheme is inapplicable, and secondly the plaintiff having failed to establish that he is exempt from NSSA scheme by virtue of the proviso to Section 13 (1) thereof, plaintiff cannot escape the requirements of Section 10 of the scheme.

I therefore find that the special plea by the 1st defendant was properly taken. This therefore renders it unnecessary to consider the two exceptions raised by the 1st defendant.

Accordingly, the following order is hereby made.

It is hereby ordered that:

The plea in bar raised by the 1st defendant against plaintiff's claim for want of compliance with section 10 of the National Social Security Authority (Accident Prevention and Workers Compensation Scheme) (prescribed matters) Notice, 1990 (SI 68 of 1990) is hereby upheld with costs.

M. Mureri, plaintiff legal practitioner
S.C Ncube, for the 1st defendant legal practitioner